IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs September 20, 2006

STATE OF TENNESSEE v. ANTHONY RIGGS

Direct Appeal from the Circuit Court for Wayne County
No. 13,665 Stella Hargrove, Judge

No. M2005-02105-CCA-R3-CD - Filed January 8, 2007

Following a jury trial, the Defendant, Anthony Riggs, was found guilty of rape, a Class B felony, and was sentenced to twelve years' confinement. In his appeal, Defendant contends that the trial court imposed an excessive sentence and argues that the trial court sentenced him contrary to *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531 (2004). After a thorough review of the record, the judgment of the trial court is affirmed.

Tenn. R. App. P. 3, Appeal as of Right; Judgment of the Circuit Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and JOHN EVERETT WILLIAMS, JJ., joined.

Claudia S. Jack, District Public Defender; and R.H. Stovall, Jr., Assistant Public Defender, Pulaski, Tennessee, for the appellant, Anthony Riggs.

Robert E. Cooper, Jr., Attorney General and Reporter; Brent C. Cherry, Assistant Attorney General, T. Michel Bottoms, District Attorney General; and Douglas A. Dicus, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

I. Background

The victim in this case, C.R., was thirteen years old at the time of the incident. (The minor victim will be referred to by her initials.) C.R. was spending the night with her friend Hope, who was Defendant's daughter, at Defendant's house. Defendant gave Hope and C.R. Natural Light beer. C.R. drank the beer mixed with Mountain Dew. The three played a drinking game known as "quarters." The two girls then went to lie down on a bed. While they were lying down, Defendant's ex-wife came to the house to argue about a bill. After the ex-wife left, Defendant and the two girls sat on the couch. Hope stated that she was tired and wanted to go to bed. C.R. remained on the couch to finish watching a movie they had begun watching earlier.

Defendant and C.R. were on the couch watching the movie between 3:00 and 4:00 a.m. Defendant brought a pillow and blanket for C.R. As they were watching the movie, Defendant removed C.R.'s sock and began rubbing her leg. He pulled C.R. close to him and tried to pull her shorts off, but they would not come off. He then unbuttoned the shorts, removed them, and threw them on the floor. Defendant inserted his finger in C.R.'s vagina "over and over for like three or four minutes," according to the victim. Defendant then pulled off C.R's boxer shorts, went to a shelf on her side of the couch and retrieved a condom. He put the condom on and proceeded to penetrate her vagina with his penis while lying on top of her. C.R. told Defendant to stop but he told her to, "stop acting like a bitch and take it like a woman." Defendant then flipped C.R. over onto her knees and penetrated her vagina from behind, while saying, "[Y]ou know you want it."

When he finished, Defendant told C.R. to go to the bathroom. When she refused, Defendant went to the bathroom and left her alone. Defendant came out of the bathroom and threatened to kill C.R. if she ever told anyone what happened.

C.R. was afraid to leave at 3:00 or 4:00 a.m., so she went to sleep. When she awoke the next morning, she and Hope went for a walk, and C.R. told Hope that Defendant had raped her. C.R. then walked to another friend's house and called her mother. Her mother came to get her and immediately took C.R. to the hospital.

The doctor at the hospital performed an examination. He found that C.R.'s hymen had been torn. C.R. also had an abrasion on the inside of her thigh. He opined that C.R. had had sexual intercourse within twelve to twenty-four hours before the examination.

On December 13, 2005, the Wayne County Grand Jury indicted Defendant on one count of rape. On June 8, 2005, a jury convicted Defendant as charged. The trial court held a sentencing hearing on July 18, 2005. The trial court sentenced Defendant as a Range I, standard offender, to twelve years.

II. Sentencing Issues

Defendant argues that the trial court erred by imposing an excessive sentence. Defendant specifically argues that the trial court erred in its application of five enhancement factors. When a defendant challenges the length or the manner of service of his or her sentence, this Court must conduct a de novo review with a presumption that the determinations made by the trial court are correct. T.C.A. § 40-35-401(d); *State v. Imfeld*, 70 S.W.3d 698, 704 (Tenn. 2002). This presumption, however, is contingent upon an affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Pettus*, 986 S.W.2d 540, 543-44 (Tenn. 1999). If the record fails to show such consideration, the review of the sentence is purely *de novo*. *State v. Shelton*, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992). Because the trial court erred in the application of certain enhancement factors, our review is de novo without a presumption of correctness.

In making its sentencing determinations the trial court must consider: (1) the evidence presented at the sentencing hearing; (2) the pre-sentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct; (5) any appropriate enhancement and mitigating factors; (6) the defendant's potential or lack of potential for rehabilitation or treatment; and (7) any statements made by Defendant in his own behalf. T.C.A. §§ 40-35-103 and -210; *State v. Williams*, 920 S.W.2d 247, 258 (Tenn. Crim. App. 1995). The defendant bears the burden of showing that his sentence is improper. T.C.A. § 40-35-401(d) Sentencing Commission Comments; *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991).

As a Range I, standard offender, Defendant is subject to a sentence of between eight and twelve years for his conviction of rape, a Class B felony. T.C.A. § 40-35-112(a)(2). In calculating the sentence for a Class B felony conviction, the presumptive sentence is the minimum of the range if there are no enhancement or mitigating factors. *Id*. § 40-35-210(c). If there are enhancement but no mitigating factors, the trial court may set the sentence at or above the minimum of the range. *Id*. § 40-35-201(d). Should there be enhancement and mitigating factors, the trial court must start at the minimum of the range, enhance the sentence within the range as appropriate for the enhancement factors, then reduce the sentence within the range as appropriate for the mitigating factors. *Id*. § 40-35-201(e).

We note that effective June 7, 2005, the General Assembly amended Tennessee Code Annotated sections 40-35-102, -210, and -401. *See* 2005 Tenn. Pub. Acts ch. 353, §§ 1, 6, 8. However, the amended code sections are inapplicable to Defendant's appeal. For defendants who are sentenced after June 7, 2005, for offenses committed on or after July 1, 1982, and prior to June 7, 2005, the defendant may elect to be sentenced under the provisions of the act by executing a waiver of such defendant's ex post facto protections. There is no indication in the record that Defendant executed such a waiver. Thus, Defendant's offense, which was committed prior to June 7, 2005, will be governed by prior law. *See* T.C.A. § 40-35-114 (2005), Sentencing Commission Comments.

The trial court made the following findings at the conclusion of the sentencing hearing:

> Let's start out by saying that [Defendant] is here for sentencing after being convicted by a jury, on June 9, 2005, of rape, a Class B felony. He is Range I. He is sentenced under the prior law, which we all know changed this June.
>
> We look to 40-35-102, the Court has to consider in setting a sentence, providing an effective general deterrence to those likely to violate the law, as well as restraining those with a lengthy history of criminal conduct. The Court has to consider whether confinement is necessary to avoid deprecating the seriousness of the offense considering the circumstances of the offense.

The Court is considering the lack of candor on the part of [Defendant] in his testimony at trial, as well as sentencing, insofar as his failure to accept responsibility and any lack of truthfulness.

The Court has to consider whether measures less restrictive then confinement have frequently or recently been applied unsuccessfully to this defendant.

The Court is considering whether potential or lack of potential for rehabilitation or treatment should be considered.

The Court is considering the testimony that she heard at trial. She's considering the testimony at this sentencing hearing.

The Court is considering the enhancement factors, as well as any mitigating factors that are appropriate.

Insofar as the enhancement factors, for the record, the history of criminal convictions or behavior factor is agreed to.

The violation of trust is also agreed to. And certainly, the record shows, through the testimony, that [the victim] and Hope used to be very good friends, and that [the victim] had spent the night there in the past, in the company of [Defendant], when nothing occurred. Certainly, there was a situation where there was trust placed in [Defendant] to take care of these girls, and in particular, [the victim].

The vulnerability factor. The victim was particularly vulnerable because of age or physical or mental disability. This has always been an interesting factor for this Court. Of course, we know through case law that age alone is not enough, even with a very young child, as a victim of sexual abuse, it appears.

I think the case law talks about whether the victim is capable of resisting, summoning help, or testifying against the defendant. I looked at State versus Adams case, 864 SW 2nd 31. That's a Supreme Court case of 1993. And I think beyond that – that's what the bottom line for that particular factor appears to be.

Of course, we all know through, everybody that testified at this trial, that these girls were drinking Natural Ice beer with [Defendant]. [The victim] testified that during this "game" that they were playing, she had five or six cups. She was mixing hers with Mountain Dew. And that she felt the effects of it.

She testified that Hope was drinking hers straight, however, and had some seven to eight cups. And so the Court is going to give some degree – consideration

to the victim as being particularly vulnerable, because of the five to six cups of Natural Ice, when she was feeling the effects of it, under the physical disability.

This Court believes that [Defendant] not only encouraged, but also put into effect there and caused it to happen.

The Court is considering that this defendant has a previous history of unwillingness to comply with conditions of a sentence involving release into the community. Certainly, the record shows that he has been placed on probation, and has been revoked at least twice that we know of.

There is also a factor in rape cases, I think case law will support, that is not in sexual battery. But, in rape, the Court can consider the offense involved a victim, and was committed to gratify the defendant's desire for pleasure or excitement. And even though the State did not ask the Court to consider it, I believe a Court has an obligation to consider additional enhancements factors, if indeed they are appropriate. So the Court is considering that.

. . . .

All right. I'm considering that, too. Those are the enhancing factors that this Court thinks are appropriate.

Insofar as mitigating, [defense counsel], the Court is considering number 13 in that [Defendant] has suffered abuse as a child. For the Court to consider that, the Court would have to believe [Defendant], and the Court has considerable difficulty with the credibility of [Defendant], both at trial and sentencing.

And so the Court finds that there are no mitigating factors. If indeed there was independent proof, then the Court would consider that, but I cannot trust the testimony of [Defendant].

The trial court applied five enhancement factors. The trial court incorrectly applied two of the five enhancement factors. Enhancement factor (7), that the offense was committed to gratify the defendant's desire for pleasure or excitement, T.C.A. § 30-35-114(7) (Supp. 2005), has been improperly applied. The State concedes this fact in its brief. "The desire for pleasure or excitement should not be inherently presumed from the act of rape." *State v. Adams*, 864 S.W.2d 31, 35 (Tenn. 1993). For this factor to be applied, the State must "provide additional objective evidence of the defendant's motivation to seek pleasure or excitement through sexual assault." *State v. Arnett*, 49 S.W.3d 250, 262 (Tenn. 2001). The State did not present such evidence. Therefore, the trial court incorrectly applied this factor.

The trial court also incorrectly applied enhancement factor (4), T.C.A. § 40-35-114(4) (Supp. 2005), that the victim was particularly vulnerable because of age or physical disability. The trial court based this factor on the fact that Defendant had given the victim alcohol and she was particularly vulnerable because of the alcohol and was therefore under a physical disability. In *State v. Nicolas Williams*, No. M1999-00780-CCA-R3-CD, 2001 WL 741935 (Tenn. Crim. App., at Nashville, July 3, 2001), *perm. to appeal denied*, (Tenn. Dec. 17, 2001), this Court approved the application of this enhancement factor in a similar situation. Williams was sexually assaulting his teenage daughter's minor friends after supplying them with alcohol and marijuana. This Court stated:

> [A] victim's physical or mental limitation may be temporary or self-induced. [*State v.*] *Clayton Eugene Turner*, [No. 03C01-9805-CR-000176,] 1999 WL 817690, at *18 [(Tenn. Crim. App. 1999)]. The State must prove that the victim's limitations render her particularly vulnerable, and this is a factual issue to be determined by the trier of fact on a case-by-case basis. *State v. Gray*, 960 S.W.2d 598, 611 (Tenn. Crim. App. 1997).

Nicholas Williams, 2001 WL 741935 at *11.

The trial court found the victim to be particularly vulnerable because she consumed "five or six" cups of the Natural Light/Mountain Dew mixture. Defendant argues that there is no evidence in the record that the victim "was drunk, under the influence, or feeling the effect of the alcohol when she was attacked." The State concedes in its brief that there was no evidence that the victim was affected by the alcohol. The State argues that "the trial court is allowed to make reasonable inferences based on the facts presented." However, with regard to this factor, the State must prove that the victim's limitations made her vulnerable. This is not a situation where the trial court may make inferences. Therefore, the trial court improperly applied this enhancement factor.

We now turn to the remaining three factors. The trial court applied factor (1), "the defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range." T.C.A. § 40-35-114(1) (Supp. 2005). The defendant's pre-sentence report includes four misdemeanor convictions for worthless checks and other criminal charges including assault. In addition, Defendant's ex-wife testified that he had physically abused her on several occasions. For these reasons, the trial court had ample support for the application of this factor.

The trial court also applied enhancement factor (14), "the defendant abused a position of . . . private trust . . . ." T.C.A. 40-35-114(14) (Supp. 2005). In *State v. Gutierrez*, 5 S.W.3d 641 (Tenn. 1999), our supreme court held that:

> Application of [this] factor requires a finding, first, that the defendant occupied a position of trust, either public or private. The position of parent, step-parent, babysitter, teacher, coach are but a few obvious examples. The determination of the

> existence of a position of trust does not depend on the length or formality of the relationship, but upon the nature of the relationship. Thus, the court should look to see whether the offender formally or informally stood in a relationship to the victim that promoted confidence, reliability or faith.

5 S.W.3d at 645 (quoting *State v. Kissinger*, 922 S.W.2d 482, 488 (Tenn. 1996)). The trial court based the application of this factor upon the fact that the victim and Hope had been friends for quite some time. Throughout this friendship, the victim had spent the night on several occasions with Defendant and his daughter. Obviously, Defendant was entrusted with the care of the girls on these occasions. We agree with the trial court that this fact placed Defendant in a position of private trust. Therefore, this factor has been properly applied.

The final enhancement factor the trial court applied was that Defendant had a previous history of unwillingness to comply with the conditions of a sentence including release in the community. T.C.A. § 30-35-114(8) (Supp. 2005). The trial court cites to the record to support application of this factor. The pre-sentence report shows that Defendant's probation was revoked in October 2001, and that he was convicted for a probation violation in December 2003. There is ample support for this factor.

Defendant also complains that the trial court did not apply the fact that he was physically abused as a child as a mitigating factor under Tennessee Code Annotated section 40-35-113(13) (2003). At the sentencing hearing, Defendant's ex-wife testified that she had been told by both Defendant and his family that he had been abused as a child. Defendant also testified to the same effect at the sentencing hearing. The trial court declined to apply this mitigating factor because the trial court determined that Defendant lacked credibility. There was no direct evidence of the alleged abuse other than Defendant's testimony. This Court cannot substitute its judgment for that of the trial court with regard to the credibility of witnesses. Because there is no other direct evidence, we must rely on the trial court's judgment. Therefore, the trial court was correct in not applying the alleged physical abuse of Defendant as a mitigating factor.

The trial court incorrectly applied two of the five enhancement factors. This Court has determined that the remaining three have ample support. Defendant was subject to a sentencing range of eight to twelve years. As stated above, the trial court is directed to start at the minimum in the range, which would be eight years, and apply any enhancing factors and then any mitigating factors. In *State v. Gomez*, 163 S.W.3d 632 (Tenn. 2005), our Supreme Court concluded that "[t]he Reform Act [of Tennessee] authorizes a discretionary, non-mandatory sentencing procedure and requires trial judges to consider the principles of sentencing and to engage in a qualitative analysis of enhancement and mitigating factors . . . all of which serve to guide trial judges in exercising their discretion to select an appropriate sentence within the range set by the Legislature." *Id*. at 661. Upon the finding of even one enhancement factor, "the statute affords to the judge discretion to choose an appropriate sentence anywhere within the statutory range." *Id*. at 659.

The three remaining enhancement factors are sufficient to enhance Defendant's sentence to twelve years. There were no mitigating factors to apply. Therefore, the trial court did not err in sentencing Defendant to twelve years.

III. Blakely v. Washington

Defendant also argues that the trial court erred in sentencing him contrary to *Blakely v. Washington*, 124 S.Ct. 2531 (2004). Defendant acknowledges the Tennessee Supreme Court's decision in *Gomez*, but points out that a Petition for Writ of Certiorari was filed with the United States Supreme Court on August 15, 2005.

At this point and time, *Gomez* is still valid law in Tennessee. Therefore, this issue is without merit.

CONCLUSION

After a thorough review of the record, we affirm the judgment of the trial court.

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THOMAS T. WOODALL, JUDGE